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No. 92-1589

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

EXXON SHIPPING COMPANY,
Petitioner,
v.
THEODORE M. ELLENWOOD, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*; BRIEF FOR THE AMERICAN INSTITUTE OF MERCHANT SHIPPING, AMERICAN WATERWAYS OPERATORS, AND LAKE CARRIERS' ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

KEITH A. JONES
FULBRIGHT & JAWORSKI, L.L.P.
801 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 662-0200

CHARLES F. HERD, JR.
FULBRIGHT & JAWORSKI, L.L.P.
1301 McKinney
Houston, Texas 77010
(713) 651-5151

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION OF THE AMERICAN INSTITUTE OF MERCHANT SHIPPING, AMERICAN WATERWAYS OPERATORS, AND LAKE CARRIERS' ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

The American Institute of Merchant Shipping, American Waterways Operators, and Lake Carriers' Association hereby move pursuant to Rule 37.2 for leave to file a brief as *amici curiae* supporting the petitioner in this case. A motion is necessary because respondents Theodore M. and Ann M. Ellenwood have refused to consent to the filing of the brief.

The court of appeals below held that a maritime employment relationship that has no dominant connection with any particular state and is not local in character nonetheless is governed by state law (in this case, state human rights statutes) rather than general maritime law. That holding directly affects the interests of all shipowners and operators whose vessels sail from state to state or on the high seas. Movants are trade associations that

represent a broad spectrum of such shipowners and operators.

The American Institute of Merchant Shipping ("AIMS") is a trade association that represents the interests of the United States merchant shipping industry in the many areas affecting promotion, ownership, and operation of U.S.-flag vessels. Its members include persons who own, operate, or charter U.S.-flag vessels and who employ seamen in connection with the operation of those vessels. AIMS regularly and actively attempts to further the interests of its members by appearing before federal agencies, by participating in litigation as a party or as *amicus curiae,* by providing testimony before Congress, by involvement in activities of international organizations, and in other ways. The accompanying brief *amici curiae* has been carefully reviewed and formally approved by a majority of AIMS' members and is being submitted on their behalf.

American Waterways Operators ("AWO") is the national trade association for the inland and coastal barge and towing industry, encompassing approximately 800 towing companies with nearly 180,000 employees. The mission of AWO is to serve as the definitive spokesman for this industry; its objectives are to inform members on federal actions and proposals affecting their interests, to represent those interests before the federal government, and to promote the highest standards of health, safety, and training. The accompanying brief *amici curiae* is submitted on behalf of those members of AWO whose vessels regularly ply the inland or coastal waters of several states and whose operations are nonlocal in character.

Lake Carriers' Association ("LCA") is the trade association for operators of U.S.-flag freighters on the Great Lakes and as such actively represents the interests of its members before legislative and regulatory bodies and also conducts studies and compiles statistics on matters relating to their operations. LCA recently completed a study

of bona fide occupational qualifications for mariners in order to facilitate its members' compliance with the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, and thus has a special interest in whether the uniform federal requirements applicable to its members' operations may be superseded or supplemented by variant state legislation.

By virtue of their wide and diverse memberships and their long familiarity with and involvement in maritime matters, movants can assist the Court in understanding the historical context and vital importance of the question of general maritime uniformity that this case presents. For more than a century, at least since *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1875), nonlocal maritime employment relationships between shipowners and the seamen who man their vessels have been governed by federal admiralty law rather than by the inharmonious and nonuniform prescriptions of state law. *See Kossick* v. *United Fruit Co.*, 365 U.S. 731, 741 (1961). The decision of the First Circuit in this case marks a dramatic departure from this settled legal principle; the issue thus raised is one of grave concern to movants, their members, and maritime employers generally.

For these reasons, movants ask leave to file the accompanying brief.

Respectfully submitted,

KEITH A. JONES
FULBRIGHT & JAWORSKI, L.L.P.
801 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 662-0200

CHARLES F. HERD, JR.
FULBRIGHT & JAWORSKI, L.L.P.
1301 McKinney
Houston, Texas 77010
(713) 651-5151

QUESTION PRESENTED

This brief *amici curiae* addresses the following question:

Whether, contrary to *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918), and other similar decisions of this Court, state law rather than general maritime law governs a maritime employment relationship that has no dominant connection with any particular state and is not local in character.

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BRIEF FOR THE AMERICAN INSTITUTE OF MERCHANT SHIPPING, AMERICAN WATERWAYS OPERATORS, AND LAKE CARRIERS' ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

The American Institute of Merchant Shipping ("AIMS") is a trade association that represents the interests of the United States merchant shipping industry in the many areas affecting promotion, ownership, and operation of U.S.-flag vessels. Its members include persons who own, operate, or charter U.S.-flag vessels and who employ seamen in connection with the operation of those vessels. AIMS regularly and actively attempts to further the interests of its members by appearing before federal

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American Waterways Operators ("AWO") is the national trade association for the inland and coastal barge and towing industry, encompassing approximately 800 towing companies with nearly 180,000 employees. The mission of AWO is to serve as the definitive spokesman for this industry; its objectives are to inform members on federal actions and proposals affecting their interests, to represent those interests before the federal government, and to promote the highest standards of health, safety, and training.

Lake Carriers' Association ("LCA") is the trade association for operators of U.S.-flag freighters on the Great Lakes and as such actively represents the interests of its members before legislative and regulatory bodies and also conducts studies and compiles statistics on matters relating to their operations.

In short, *amici* represent a broad spectrum of shipowners and operators whose vessels sail from state to state and on the high seas and whose interests thus will be directly and significantly affected by the decision in this case.

STATEMENT

The facts directly relevant to the issue of principal concern to *amici* and their members may be briefly stated. Respondent Theodore M. Ellenwood ("Ellenwood") was a maritime employee of petitioner Exxon Shipping Company ("Exxon"). Although Ellenwood is a resident of Maine, his employment relationship with Exxon had little or no connection with any particular state: he served as chief engineer on a ship that "plies the coastal waters of the United States, thus touching the jurisdiction of many states." Pet. App. 42a-43a n.5. Exxon removed Ellenwood from his position as chief engineer in 1989 because

of his history of alcohol abuse. Pet. App. 39. Ellenwood then brought this action, contending, *inter alia,* that his removal violated one or more of the human rights statutes of Maine, New Jersey, or Texas.

The district court rejected this claim. Citing *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), the court ruled that "the applicable law is maritime law, not state law." Pet. App. 42a. The court further determined that in applying maritime law it would not "defer to local policy, [for] it is apparent that this is the type of case that cries out for uniformity." *Id.* at n.5. The court reasoned that due to the nonlocal nature of Ellenwood's employment, no single state "has a peculiar interest in the contractual relationship. These are the kinds of considerations that led the Court in *Kossick* . . . to conclude that local law should not apply but that a uniform maritime law should govern." *Id.*

The court of appeals reversed. Extrapolating from cases involving maritime accidents in state territorial waters, the court reasoned that admiralty courts must apply state law " 'absent a clear conflict with the federal [maritime] law.' " Pet. App. 16a, quoting *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 341 (1973) (brackets added by court of appeals). Perceiving "nothing in substantive maritime law that is even potentially at odds with state human rights statutes," *id.* at 18a, the court held that Ellenwood could pursue his claim under state law. The court offered no guidance, however, concerning which state's law would control; that issue was left for consideration by the district court on remand. *Id.* at 4a n.3.

ARGUMENT

As a rule, the respective rights and obligations of maritime employers and the seamen they hire are determined by reference not to state law but to general maritime law. *See, e.g., Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 408-11 (1953); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 381-82 (1917); *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 217-18 (1917). General maritime law is "a system of law coextensive with, and operating uniformly in, the whole country. . . . [T]o place the rules and limits of maritime law under the disposal and regulation of the several States . . . would . . . defeat[] the uniformity and consistency at which the Constitution aimed . . . ." *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875).

To be sure, "the doctrines of the uniformity and supremacy of the maritime law" are not absolute. *Kossick*, 365 U.S. at 738. The relationship between maritime law and state law is one of accommodation. *Id.* at 739. A court sitting in admiralty may defer to local law where local concerns are paramount—where, that is, "[t]he subject is maritime and *local in character* and the [application of state law] will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations." *Western Fuel Co. v. Garcia*, 257 U.S. 233, 242 (1921) (emphasis added). But where no single state has "any 'pressing and significant' interest," there is no basis or justification for the "application of state-law principles." *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 n.2 (1986), quoting *Kossick*, 365 U.S. at 739. In such circumstances, "the Admiralty Clause itself has a pre-empting negative effect on state law . . . ." D. Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 Sup. Ct. Review 158, 166 (1960).

The First Circuit in this case fundamentally mistook the respective roles of federal and state law in cases falling within the admiralty jurisdiction. In admiralty, there is no presumption that state law will govern in the absence of a clear conflict with federal law. The presumption is just the opposite: general maritime law controls unless the pertinent facts are of such manifestly local character that the state's interest in enforcing its own law within its own geographical boundaries outweighs the need for and value of maritime uniformity. *Compare Kossick*, 365 U.S. at 741, *with Just v. Chambers*, 312 U.S. 383, 389 (1941). This means that general maritime law, not the human rights statute of some as-yet undetermined state, must govern nonlocal maritime employment relationships such as that between Exxon and Ellenwood. The decision below to the contrary squarely conflicts with *Kossick*, *Chelentis*, and other similar cases.

Ellenwood's maritime employment manifestly was not "local in character." *Western Fuel*, 257 U.S. at 242. To the contrary, his employment was distinctly *nonlocal* in character. *See* Pet. App. 42a-43a n.5. Ellenwood is the archetypal seaman, whose movements from port to port and on the high seas both illustrate and verify the need for a uniform set of legal rules governing maritime employment. "Considering that sailors of any nationality may join a ship in any port, . . . this is such a contract as may well have been made anywhere in the world, and . . . the validity of it should be judged by one law wherever it was made." *Kossick*, 365 U.S. at 741. *See also Romero v. International Terminal Operating Co.*, 358 U.S. 354, 383 (1950) ("the place of contracting is largely fortuitous and of little importance"). Nonlocal maritime employment relationships such as this lie at the very core of admiralty jurisdiction and general maritime law. Subjecting such employment relationships to the vagaries of state law would remove a major cornerstone from the ancient doctrine of maritime uniformity.

The rationale for the occasional application of state law in maritime settings is that "a State, in the exercise of its police power, may establish rules applicable on land and water *within its limits*, even though these rules incidentally affect maritime affairs, provided that the state action 'does not . . . work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations.' " *Just v. Chambers*, 312 U.S. at 389 (emphasis added). Thus, states may furnish remedies for maritime wrongs that maritime employers commit in state territorial waters; such remedies do not disturb the uniformity of the underlying standards of conduct to which maritime employers must conform. *See, e.g., Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 123-24 (1924); *Western Fuel*, 257 U.S. at 242. To a limited degree, states also may impose substantive standards of conduct to be followed within territorial waters. *E.g., Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 447 (1960); *The Tungus v. Skovgaard*, 358 U.S. 588, 590-91 (1959). The First Circuit arrived at the result below by improperly generalizing from cases of this kind, which deal with matters of peculiarly local concern.

The First Circuit erred by confusing the exception (state-law principles) with the rule (general maritime law). It is well established that states may not impose their own substantive standards of conduct on maritime activities that are *not* "peculiarly a matter of state and local concern." *Kossick*, 365 U.S. at 741. In particular, states are not empowered to vary the rights and liabilities established by and associated with the employment relationship between shipowner and seaman; as this Court has held repeatedly and explicitly, those rights and liabilities must be uniform and remain the same wherever the ship may sail and whatever its port of call. *Kossick*, 365 U.S. at 741; *Pope & Talbot*, 346 U.S. at 408-11; *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 248-49 (1942); *Robins Dry Dock & Repair Co.*

v. Dahl, 266 U.S. 449, 457 (1925); *Union Fish Co. v. Erickson,* 248 U.S. 308, 313-14 (1919); *Chelentis,* 247 U.S. at 381-82; *Southern Pacific,* 244 U.S. at 217-18.

The First Circuit's decision flies in the face of these cases and the principle they establish. Its decision, moreover, is thoughtlessly impractical as well as doctrinally impure. If nonlocal maritime employment relationships were to be made subject to the varying standards of local law, there would be no way a maritime employer could know, either as a general matter *or in this very case,* which state's law would control. This would pose something of an administrative nightmare: as to each and every seaman, the maritime employer would be forced to try to conform its employment practices and policies to the inharmonious and nonuniform prescriptions of many, if not all, of the 50 states. A central purpose of general maritime law is to relieve the shipowner from precisely that predicament: "it is almost impossible for [the master] to acquaint himself with the laws of each individual State he may visit, and he has a right to suppose that the general maritime law applies to him and his ship, wherever she may go." *The Roanoke,* 189 U.S. 185, 195 (1903).

In many instances, conformity with the law of each state may be literally impossible. Even state human rights statutes differ greatly in their coverage. *See* Pet. 11-12. And when states do agree concerning what constitutes a legally protected physical or mental handicap, they nevertheless may disagree respecting the remedial measures an employer must take. *Id.* at 12-13. Of special concern to maritime employers is the risk that different states could insist upon different and incompatible shipboard configurations or other physical conditions of employment. Such requirements would, without question, seriously "disturb the uniformity of maritime law." *Kossick,* 365 U.S. at 738.

Even if compliance with multiple state human rights statutes were not a "physical impossibility," *Florida Lime*

& Avacado Growers, Inc. v. *Paul*, 373 U.S. 132, 143 (1963), application of state law nonetheless would subject maritime employers to the inexorable logic of the lowest common denominator. Not knowing which state's law might apply to which seamen or potential seamen, the maritime employer would find it necessary, as to each of the innumerable "physical and mental conditions [that] may be subsumed under the rubric of 'handicap,' " A. Larson, 3A *Employment Discrimination* § 107.32(a) at 22-121 to 22-122 (1993), first to identify and then to comply with the law of the state that treats that handicap most generously—no matter how ill-considered that law may be from the perspective of maritime employment and maritime operations. For example, as regards obesity the martime employer might be constrained to comply with the law of New York, which treats that condition as a protected employment handicap; whereas as regards high blood pressure, which New York does not consider an employment handicap, the employer might be constrained to comply with the law of California, which does view high blood pressure as a handicap. *See* Pet. 11-12. In this way, the dominant contours of the maritime employment relationship could become the plaything of even inland state legislatures—a vivid example of the tail wagging the dog.

This case not only "cries out for uniformity," Pet. App. 42a n.5, it cries out for the application of a genuinely maritime body of law responsive to important maritime concerns. A maritime employer's overriding obligation is "to furnish a seaworthy vessel and crew." *Indiana Civil Rights Comm'n* v. *American Commercial Barge Line Co.*, 523 N.E.2d 241, 244 (Ind. App. 1988), *cert. denied*, 492 U.S. 920 (1989). State human rights statutes are not responsive to the need for seaworthiness and to the vital role seaworthiness plays in the evaluation of prospective and current seamen. Maritime employers should not be placed in the crossfire of seaworthiness obligations imposed by the general martime law and employment obli-

gations imposed by state legislatures having no sensitivity to or experience with maritime matters—even if the states, by happenstance, have established generally similar or even identical rules. *See id.* at 244-45 (holding that maritime employment is outside the reach of state laws relating to the employment rights of the visually impaired). Moreover, it is not enough to say, as the First Circuit did in this case, Pet. App. 19a-20a, that seaworthiness concerns may be available to the maritime employer as a defense to claims of employment discrimination on a case-by-case basis. Maritime employers should be able to adopt and adhere to reasonable rules designed to safeguard seaworthiness, as Exxon did here in establishing a rule with respect to alcohol abuse, without being forced to litigate the propriety of individual applications of those rules as a matter of state law.

There is no true humanitarian need for the contrary result reached by the First Circuit in this case. To the extent necessary and appropriate, American seamen are adequately and fully protected by federal law. Most if not all major martime employers have long been subject to section 503(a) of the Rehabilitation Act of 1973; 29 U.S.C. § 793(a), which requires federal contractors to "take affirmative action to employ and advance in employment qualified individuals with handicaps." And now all such employers are subject to the requirements of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* In these circumstances—and in contrast, for example, to the situation prevailing with respect to claims for wrongful death prior to the enactment of the Death on the High Seas Act, 46 U.S.C. §§ 761 *et seq., see The Hamilton,* 207 U.S. 398, 404 (1907)—there is no need or justification for state supplementation of the federal rules pertaining to maritime employment.

If left standing, the decision below is likely to work considerable mischief. That mischief—like the First

Circuit's reasoning that gives rise to it—cannot easily be confined just to the narrow realm carved out by state human rights statutes. By ignoring the most basic limitation on the applicability of state law in admiralty—that only maritime activities that are strictly "local in character," *Western Fuel,* 257 U.S. at 242, may be made subject to substantive state law standards—the First Circuit has opened the door to state interference with and control of all aspects of maritime employment. That way lies chaos.

This Court should grant review in this important case in order to reestablish and confirm the uniformity and supremacy of the general maritime law as it applies to nonlocal maritime employment relationships.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KEITH A. JONES
FULBRIGHT & JAWORSKI, L.L.P.
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